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No. 265.

Office Supreme Court U.S.
FILED
JAN 5 1901
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Br. of Wright for D. C. & co.

Filed Jan. 5, 1901.

MOTION TO DISMISS WRIT OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Term Number 265.

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

(17,738)

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DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR

To MILTON REMLEY, ESQ., Attorney for the Plaintiff in Error, Iowa City, Iowa:

SIR: You will please take notice that the Defendants in Error, Edwin O. Rood, Charles W. Rood, and George R. Pearsons, will, upon Monday, the 28th day of January, 1901, at the opening of court on said day, or as soon thereafter as counsel can be heard, move the Supreme Court of the United States at the court room of said Supreme Court at the Capitol in the City of Washington, D. C., to dismiss the writ of error to the Supreme Court of Iowa heretofore, and on or about the 31st day of March, A. D. 1900, sued out of said Supreme Court of the United States by said plaintiff in error above named, and for such other and further order or relief as to the court may seem just.

Further take notice, that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled, because:

1. This cause does not involve a federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any State on the ground that such statute is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa upon appeal, whatever the decision of that court thereon (if any) may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court, irrespective of what its decision (if any) may have been upon such federal question.

Further take notice, that at the same time and place said defendants in error will move said Supreme Court of the United States for such other and further order or relief as to said Supreme Court of the United States may seem just.

Further take notice, that said motion will be made upon all the records, files and papers of said cause above entitled, on file in said Supreme Court of the United States, which will be referred to in support thereof.

R. M. WRIGHT,
Counsel for Defendants in Error.

Service of the foregoing notice and of the following motion

and brief acknowledged and accepted and a copy of each thereof received on this ....day of December, A. D. 1900.

....

Attorney for Plaintiff in Error.

The State of Iowa, Plaintiff in Error,
vs.
Edwin O. Rood, Charles W. Rood, George A. Wallace, Emily Wallace, George S. Wallace, and Mrs. George S. Wallace.

MOTION

Now come Edwin O. Rood, Charles W. Rood, and George R. Pearsons, through their undersigned counsel, and move the court to dismiss the writ of error to the Supreme Court of Iowa, heretofore, to-wit: on or about the 31st day of March, A. D. 1900, sued out in this cause, in said cause, and for such other and further order or relief as to the court may seem just.

SPECIFICATION OF GROUNDS FOR MOTION.

The motion to dismiss the writ of error made above is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Iowa, heretofore entered in this cause, because:

1. This case does not involve a federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any State on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa upon appeal, whatever the decision of that court thereof (if any

may have been, another question, not federal, was also involved and decided adversely to the plaintiff in error, and the decision of this latter question is sufficient to sustain the judgment of that court irrespective of what its decision (if any) may have been upon such federal question.

STATEMENT OF THE CASE.

To enable this court to pass upon, determine and decide the foregoing motion, the case will be sufficiently stated by setting out from, the transcript, the pleadings, the decision of the District Court of Humboldt County, Iowa, the opinion of the Supreme Court of Iowa, and the assignments of error made in this court by plaintiff in error, all of which are as follows:

The following entitled causes were originally brought in the District Court of Humboldt county, Iowa:

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE and MRS. GEORGE S. WALLACE, Appellees.
STATE OF IOWA, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
A. F. JOHNSON and MRS. A. F. JOHNSON, Appellees.
STATE OF IOWA, Intervenor, Appellant.

GEORGE R. PEARSONS, Appellee,
vs.
GEORGE A. WALLACE and EMILY J. WALLACE, Appellees.
STATE OF IOWA, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
B. D. BARRETT and MELINDA BARRETT, Appellees.
STATE OF IOWA, Intervenor, Appellant.

EDWIN O. ROOD and CHAS. W. ROOD, Appellees,
vs.
JAMES O'CONNELL and MRS. JAMES O'CONNELL, Appellees
STATE OF IOWA, Intervenor, Appellant.

Inasmuch as the pleadings in the above entitled cases are practically identical with the exception of the seventh paragraph of plaintiff's petition which contains a description of the land in

controversy in each case, it will be necessary to set out one set of pleadings only, and the seventh paragraph of the petition in the other cases.

In the case of Edwin O. Rood and Charles W. Rood vs. George A. Wallace et. al., on the 25th day of January, A. D. 1895, plaintiffs filed in the office of the clerk of Humboldt county the following petition in equity:

The plaintiff states:

Par. 1. That the land hereinafter described was conveyed to the State of Iowa by the United States of America under and by virtue of the Act of Congress of the United States approved on September 28th, 1850, and known as the Swamp Land Act.

Par. 2. That said land inured to the benefit of Humboldt county, Iowa, under the act of the Legislature of the State of Iowa, approved January 13, 1853, which took effect February 2, 1853, and is known as Chapter 13 of the Laws of the Fourth General Assembly of Iowa, and an act of the Legislature of the State of Iowa approved January 25, 1855, and which took effect February 21, 1855, and is known as Chapter 110 of the Laws of the Fifth General Assembly of Iowa.

Par. 3. That said land, with other land, on the 8th day of January, 1879, was, by contract in writing, between said county of Humboldt and the Fort Dodge & Fort Ridgely Railroad Company, a corporation duly organized and doing business under the laws of the State of Iowa, sold and disposed of to said Fort Dodge & Fort Ridgely Railroad Company by said county, a copy of which contract is hereto attached, marked Exhibit "A," and made a part of this petition.

Par. 4. That thereafter and in pursuance of said contract and on the 1st day of September, A. D. 1884, the said Humboldt county transferred to said railroad company all its right, title and interest in said land, a copy of which deed is hereto attached marked Exhibit "B" and made a part hereof.

Par. 5. That on the 15th day of December, A. D. 1884, the said railroad company conveyed by deed in writing to one A. McBane, all its right, title and interest in the said land, a copy of which deed is hereto attached marked Exhibit "D" and made a part of this petition.

Par. 6. That thereafter and on the 19th day of December, A. D. 1884, the said A. McBane conveyed by deed in writing to one George R. Pearsons, the said land, a copy of which deed is hereto attached marked Exhibit "C" and made a part hereof.

Par. 7. That thereafter and on the day of , 1892, the said George R. Pearsons by deed in writing conveyed the said land to the plaintiffs in this suit, which said land was conveyed by said Pearsons to these plaintiffs and which said land these plaintiffs are the owners of, and which said land is described as follows, to-wit:

The unsurveyed portions of sections twenty-one and twenty-two, in township ninety two, north of range twenty-seven, west of the fifth P. M., the same being the north part of Owl Lake, so-called, lying within the bounds of the sections named above and enclosed by wire fence except on south side, also a part of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21, in township 92, north of range 27, west of the 5th P. M., thence east 186 rods, thence south 5¾ degrees west, variation 9½ degrees, 254 rods to the main ditch now built in so-called Owl Lake, thence following the main ditch in a northwest direction to the section line between sections 27 and 28 in said township and range, thence north 30 chains and 80 links to the place of beginning, and this being part of the lands conveyed by Humboldt county to the Fort Dodge & Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

Par. 8. That on September 28, 1850, when the said swamp land act referred to in paragraph 1 hereof became a law, the said lands described in paragraph 7 hereof were in fact swamp and overflowed lands within the meaning of said act of Congress, and said land was at that time and continuously until said Pearsons received the title to said land, as set out in paragraph 6 hereof, entirely unfit for cultivation without artificial drainage by reason of the same being wet, swampy, marshy and largely grown up to rank grass, reeds and rushes, and overflowed with water.

Par. 9. That in 1884 the said Pearsons by means of ditches made by him commenced to drain and reclaim said land, and in said ditching spent a large amount of money, to-wit: $.....,

and by said ditching then made a large part of said lands suitable and valuable for pasturage; and in the year 1885 the said Pearsons built a post and barb wire fence around said land and the balance of the land constituting the so-called Owl Lake, and in said year and for several years thereafter occupied and used said lands for pasturage, and in the years 1891 and 1892 the said Pearsons and the plaintiffs herein expended a large amount of money in making ditches through said tract of land and in making a large ditch for an outlet for the water on said tract of land, and thereby in said year 1892 all of said land was perfectly drained and reclaimed and made fit for cultivation and the raising thereon of all and every kind of grain and crops produced in said part of the state of Iowa.

Par. 10. That in the years 1893 and 1894 these plaintiffs plowed about 250 acres of land so conveyed to them by the said Pearsons and in the year 1894 about 175 acres were in crop and all of said land is in suitable condition to be plowed and cropped in grain; that 18 acres of said land is now sown to fall rye and about 60 acres of said land is fall plowed and ready for seeding and the balance of said land (about 250 acres) is in corn stalks and tame grass and in 1895 we intend to crop 300 acres of said land in grain and the balance of said land (about 200 acres) will be used by us in 1895 for meadow and pasture, and these plaintiffs are now in the actual possession and occupation and use of all of said land and the same is enclosed by fence except on the south side between this tract and land owned by said Pearsons, where said ditch forms the boundary.

Par. 11. That all of the above improvements, including the said ditching and fencing, were made in good faith, and the occupation of these plaintiffs and their said grantor Pearsons, was for the purpose of actual and permanent occupation and improvement of the said several portions of said land, and the aggregate cost of said improvements, including said ditching and fencing, was about $7,000.00. That in said ditching these plaintiffs have expended in the last two years the sum of about $1,000.00, and in addition to said ditching and fencing these plaintiffs have and own upon said tract of land other improvements worth not less than $700.00.

Par. 12. And plaintiffs further state that said defendants and each of them, for the purpose and with the intent to interfere with plaintiffs' possession, occupancy and use of said lands and premises, are entering upon said land and premises and threaten to enter upon and take possession of the same and to occupy, work and crop and farm the same, and said defendants have already erected a cabin on said land and threaten and intend to put in a crop on the land which plaintiffs have fall-plowed as hereinbefore mentioned, and to erect other and permanent improvements on said lands and to interfere with and prevent the plaintiffs in the use and enjoyment of their said lands and in the cultivation and use of said lands, and plaintiffs aver that unless restrained the said defendants will carry out their said threats. That said defendants are insolvent and if said threats are carried out these plaintiffs will be irreparably damaged and remediless.

Par. 13. Plaintiffs are now having said lands surveyed and platted (said tract having been originally meandered) and they are taking he necessary steps to have the said lands patented by the United States of America to the State of Iowa, and by the State of Iowa to Humboldt County, Iowa.

Wherefore, the plaintiffs pray that the said defendants and each of them, their servants, agents and employes be forever restrained and enjoined from occupying or taking possession of or trespassing upon any portion or part of said real estate and further using or cultivating or attempting to use, plow, harrow, seed or in any other manner cultivate any part or portion thereof, and from using or taking possession of the improvements thereon and from using or taking possession of any portion or part of the improvements thereon, and from in any manner interfering with or interrupting the said plaintiffs in their use and enjoyment of said premises and the improvements thereon, and that defendants be further restrained and enjoined from erecting any buildings or improvements on said lands or any part thereof, and also that a temporary writ of injunction issue in said cause, and that on the final hearing of this cause said temporary injunction be made perpetual and that plaintiffs may have such other and further relief as may be equitable in the premises and the costs of this action.

Duly verified.

EXHIBIT A.

Exhibit A is a contract made by and between the board of supervisors of Humboldt county, in behalf of the county, and the Fort Dodge & Fort Ridgely Railroad Company on the 8th day of January, 1879, whereby Humboldt county agreed to convey to said railroad all swamp lands within said county which had been, or should afterwards be patented to said county, except such swamp lands as had previously been disposed of, and the proceeds from the sale of swamp lands, in consideration of the building of said railway and the operating of the same through certain localities in Humboldt county, subject to the ratification of the electors of said county. Exhibit A further recites that in accordance with said contract, the said contract having been ratified by the electors of said county, certain portions of the swamp lands of Humboldt county were transferred to the Ft. Dodge and Ft. Ridgely Railroad Company, the conveyance being by the instrument of which Exhibit A purports to be a copy, on the 3rd day of September, 1879; said document was filed for record the same day. The contract by and between the supervisors of said county and the railroad company is as follows:

This agreement made and entered into this eighth day of January, A. D. 1879, by and between the county of Humboldt, in the state of Iowa, represented by the board of supervisors of said county, party of the first part, and the Fort Dodge and Fort Ridgely Railroad Company, a corporation organized and doing business under the laws of the State of Iowa, party of the second part; witnesseth:

First. That said county of Humboldt, for the purpose of making a railroad through the said county, commencing at the present terminus of the line of the Fort Dodge and Fort Ridgely Railroad Company in section No. thirty three (33), township No. (91) ninety-one north of range No. twenty-eight (28), west of the 5th P. M. Iowa, in said county, and thence northwardly, to a point in said county hereinafter more fully described, has this day bargained and agreed to and with the party of the second part to appropriate and devote to the above named party of the second part, all the swamp lands now belonging to the said county, and not heretofore conveyed or reserved to settlers in the said county

of Humboldt, together with all the proceeds of the said swamp lands and all the swamp indemnity lands, swamp land, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States, or the State of Iowa, and also all swamp lands which may hereafter be patented to the said county of Humboldt, said swamp and swamp indemnity land and scrip as aforesaid, to be conveyed by deed and delivered to the said party of the second part or any person that they may designate, upon the following terms and conditions, to-wit: The said party of the second part shall on or before September 1, 1879, build its road (a medium gauge, its present gauge) to and locate and maintain its depot upon a point on the township line, between the villages of Humboldt and Dakota, not more than forty-five rods north or south of Sumner avenue in the village of Humboldt, and Mill street in the village of Dakota, and when the road is so completed, one-half (½) of all said swamp lands and one half of the proceeds thereof, including swamp indemnity lands, swamp lands, scrip and money, to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or of the state of Iowa, together with one-half of all the swamp lands which may hereafter be patented to the said Humboldt county, shall be conveyed by deed, and delivered to the said party of the second part, or to any person to whom the said party of the second part may designate, the selection of one-half of the lands (as nearly one-half in value as may be) and the proceeds thereof to be made by the chairman of the board of supervisors or such person as the board may select, and by an officer of the said company, to be selected by the said company, and if they are unable to agree they shall select a third disinterested party who shall select from the said lands and the proceeds thereof the undivided half, to be there conveyed and delivered as aforesaid, and his selection shall be as binding upon the parties as if the parties hereto had each severally agreed thereto in this contract, by a separate description herein.

The said party of the second part shall, on or before December 15, 1879, build its road to a point north of and not less than two miles distant from the township line, between township Nos. 92 and 93 and not more than one mile east or west of the

range line, between ranges 28 and 29 in said county, and when so built the remainder of said swamp lands and the proceeds thereof, together with the indemnity lands, swamp lands, scrip and money to which the said party of the first part is entitled or may hereafter become entitled under the laws of the United States or the State of Iowa, and all swamp lands which may be hereafter patented to the said Humboldt county, shall be conveyed by deed and delivered to the said party of the second part. It is also further agreed that whenever the said second party shall extend its road north of the last named point, it shall locate and build a depot within (80) eighty rods north or south of a point on the said line of road west of the new bridge now constructed across the east fork of the Des Moines river in Humboldt township. This contract is further subject to the rights of settlers now holding contracts of purchase from the said county, but the said party of the second part shall be entitled to any balance due on the said contracts at the time of the taking of the vote herein provided for, the evidence of the completion of the road to the first named depot shall be the commencement of the running of trains over the said road, to the said depot by the said party of the second part, and the evidence of the completion of the road to the second named place, shall be the commencement of the running of trains regularly over the said road to the point by the said party of the second part. It is further expressly agreed between the parties hereto, that said lands and the proceeds thereof above fully described, shall be taken by the said railroad company subject to the provisions of Section 988 of Revision of 1860 and to the amendments to section 986 of said revision of 1860, by chapter 77 of an act taking effect in 1862, entitled: An act amending Sec. 986 of the revision of 1860, in relation to swamp lands, and the party of the second part shall take the said lands and the proceeds thereof as above described, subject to all the provisions of the acts of Congress of September 28, 1850, and shall expressly release the State of Iowa and the county of Humboldt from liability for reclaiming the said lands, but the said contract shall not be construed to release the said county from any obligations between it and the State of Iowa, or between the State of Iowa and the general government, to do any acts contemplated by these acts of Congress or the act of the General Assembly of Iowa, passed January 13, 1853.

It is further agreed between the parties hereto, that upon the ratification of this contract by a majority of the legal voters of the said county of Humboldt, at a special election, called for the purpose, and the voting of a five per cent. tax in aid of the said railroad company upon the taxable property in at least eight townships in said county, for the year 1879, or in so many townships as the said railroad company shall accept for the vote of such aid in eight townships, then, and in that case, the said railroad company shall, within sixty days of such ratification and completion of the vote as aforesaid, file its acceptance of the said contract, and the said railroad company expressly reserves the right in case the said five per cent. tax aid be voted in less than eight townships to accept the aid given, which election to accept shall be evidenced by written notice of such acceptance filed with the county auditor of said county, within sixty days after the completion of the said votes in said county and in the townships as aforesaid, and this contract shall then be valid and legal, the same as if the said eight townships had voted the said aid, and the said company shall complete its road to the points above named and within the time above specified.

It is further agreed that in case of the ratification of this contract by a vote of the electors of said county, and the voting of the aid as above specified, if said company shall fail to build its road within the time hereinbefore stated, to the first-named depot, then this contract shall be deemed forfeited, and on the failure of the said company to build its road to the second-named point within the time named, the interests of the said company in the remaining one-half of the said swamp lands and proceeds thereof, etc., as above described, shall be forfeited, and said company shall file a release of any interest therein, but if the said company should complete the construction of its railroad to the first named depot within the time named, the contract shall be binding to the extent of one-half interest above named.

It is further expressly agreed that the said party of the first part shall execute such further conveyances and deeds as shall carry out the spirit and intent of this contract, in compliance with the conditions and provisions above named, *named*, that is upon the completion of the road to the first depot, said county shall make conveyance of the one-half interest as above stated,

to the lands and proceeds thereof, and on the completion of the road to the second point named, shall make the further conveyance on the remainder of the swamp lands, and the proceeds thereof *at* as above name l, and upon the patenting of any greater number of acres of said lands or indemnity lands, shall make such further conveyances or written instruments as shall carry out the true *interest* and meaning of this contract in every particular, between the parties thereto, and it is expressly agreed by the party of the second part that the said company will take said swamp lands and swamp indemnity lands, scrip and money as aforesaid, and all interest of the said Humboldt county in and to any additional rights or interests which may arise under the laws of the United States or the State of Iowa, in favor of the said county, except as h reinbefore specified, and if any part of said lands are now occupied by actual settlers and applied for under any resolution of the board of supervisors of said county of Humboldt by such settlers, the said lands shall be conveyed by said party of the second part to the said settlers at the appraised value, as fixed by appraisers heretofore appointed, or to be appointed by the board of supervisors of Humboldt county, Iowa, and in lieu of the said lands, the said railroad company, party of the second part, shall be entitled to the purchase-money as aforesaid, and interest thereon from the date the said company shall acquire title to said lands.

This contract shall be in full force and effect in accordance with the true intent thereof, from and after the same shall be ratified by a vote of the legal voters of Humboldt county, Iowa, as in such cases made and provided by law.

In witness whereof, this contract is, by order of the board of supervisors of the said party of the first part, signed by the chairman thereof, and attested by the clerk on behalf of Humboldt county, Iowa, and on behalf of the Fort Dodge and Fort Ridgely Railroad company by the president of the said company, and attested by the secretary of said company.

On behalf of Humboldt county, Iowa, this 8th day of January, A. D. 1879. B. H. HARKNESS,

Chairman of the Board of Supervisors of Humboldt County, Iowa.

Attest: ALEX. MCLAUGHLIN,

County Auditor and Clerk of the Board of Supervisors of Humboldt County, Iowa,

On behalf of the Fort Dodge and Fort Ridgely Railroad Company, this 8th day of January, A. D. 1879, by order of the board of directors of said company.

FORT DODGE AND FORT RIDGELY RAILROAD COMPANY,
(Seal.) By GEORGE W. BASSETT, President.
Attest:
GUS. L. PETERSON, Secretary.

EXHIBIT B.

Exhibit B purports to be a copy of a deed or conveyance to the Fort Dodge and Fort Ridgely Railroad Company of the remaining half of the swamp lands of Humboldt county, described as follows: The unsurveyed portions of sections 21, 22, 27, 28, in township 92, north range 27 west of the 5th P. M.; also the unsurveyed portions of sections 18, 19, 33, 34, in township 91, north of range 29, west of the 5th P. M.; also the unsurveyed portions of sections 13 and 24, in township 91 north, of range 30 west, of the 5th P. M.; also the north half of the northeast quarter of section 29, township 93 north, range 27 west, of the 5th P. M.; also the south half, the southwest quarter and the northeast quarter of southeast quarter of section 31, township 93 north, range 28 west, of the 5th P. M., said deed being from the board of supervisors of Humboldt county, in behalf of said county, and dated September 1, 1884, and filed for record on September 6, 1887.

EXHIBIT D.

Exhibit D purports to be a copy of a deed from the Fort Dodge & Fort Ridgely Railroad Company of the lands described in Exhibit B, to A. McBane, dated December 15, 1884.

EXHIBIT C.

Exhibit C purports to be a copy of a deed from A. McBane and Elizabeth McBane to Geo. R. Pearsons of the lands described in Exhibit B, dated Dec. 19, 1884, and filed for record March 4, 1885.

And on the 5th day of October, 1895, defendants filed the following

ANSWER.

Come now the defendants in the above entitled action and for answer state:

Par. 1. Deny each and every allegation contained in paragraphs 1, 2, 3, 8 and 12 of plaintiff 's petition.

Par. 2. That defendants have neither knowledge nor information sufficient to form a belief as to the allegations contained in paragraphs 4, 5, 6, 7, 9, 11 and 13 of plaintiff 's petition.

Duly verified.

And on the 15th day of November, 1895, intervenor, The State of Iowa, filed the following:

PETITION OF INTERVENTION.

Comes now the State of Iowa and by leave of the court files its petition of intervention in said cause and shows the court that it claims an interest in the matter in controversy as against both the plaintiffs and the said defendants.

The said intervenor alleges:

1. That the land described in the said petition of the said plaintiffs was and is a part of a lake bed of a lake known as Owl Lake, lying wholly within the State of Iowa, and the same did not constitute any part of the land which the United States government was authorized or empowered to sell.

2. That the State of Iowa was duly admitted into the Union and became a sovereign state in the year 1846, and as such sovereign state became and was the owner of all the lakes within its borders, subject to the right of the public to use the same and for the use of the public, and the title to the soil under said lake was and is in the said state.

3. That in surveying the public lands adjoining the said lake, the same was meandered and said land adjoining said lake, up to said meander lines, was sold by the government of the United States to divers different persons, and after such survey and sale of said land, the government of the United States had no right, title or interest in and to any part of the lake bed aforesaid, but all interest, either legal or equitable, held by the United

States Government had passed to the State of Iowa upon its admission as a sovereign state.

4. Said intervenor specially denies that the land described in plaintiff's petition was within the grant of the act of Congress approved September 28, 1850, known as the swamp land grant. Said intervenor further denies that the said lands described in plaintiff's petition were within the grant of the State of Iowa to several counties of the State, under and by virtue of the act of the legis ature, approved January 13, 1853, or under the act approved January 5, 1855, and also denies that the same was embraced within the terms of the contract between Humboldt county and the Fort Dodge and Fort Ridgely Railroad Company, and denies paragraph 4 of said plaintiffs' petition.

5. That whether or not the deeds referred to as Exhibits C and D, attached to plaintiff's petition, were in fact executed, the said intervenor has no knowledge or information sufficient to form a belief, but avers that the grantors of the said deeds were without any right, title or interest whatsoever in and to the said premises because the same were the property of the intervenor aforesaid.

6. Said intervenor further avers that said Owl Lake as aforesaid, in which the said lands described in said plaintiffs' petition were embraced was a lake in fact, and that the same by the wrongful and unlawful acts of the said plaintiffs, or some other persons unknown, has been unlawfully drained by cutting in ditches which have drawn the water of said lake therefrom, and each and every act of plaintiffs, or by whomsoever done, in draining said lake and cutting ditches therein was unlawful and without any right or color of right on the part of said plaintiffs, or the persons so doing the same, and gave the plaintiffs or such other persons no right or interest whatsoever in the said land thus drained.

7. Plaintiff avers that any act either in draining of said lake, or in entering upon possession of the said land thus drained, done either by the plaintiff, his agent or grantors, or by the defendants or either of them, was without any right, title or authority whatsoever; and any improvement put upon such lands thus drained by either the plaintiff or the defendants, or either of them, was at their own peril and without authority for so doing.

Wherefore, the said intervenor prays that a decree be entered as against both plaintiffs and the said defendants quieting the title in and to the said premises in the said intervenor, and that a writ of possession issue herein removing the said plaintiffs and the said defendants, or their agents, tenants or employes, from the said premises, and for such other and further relief as equity and good conscience may require.

And on the 18th day of November, 1895, defendants filed the following

AMENDMENT TO ANSWER.

Come now the defendants, George A. Wallace, George S. Wallace et. al., in the above entitled action, and for amendment to answer therein state:

COUNT 2.

Par. 1. That on or about the.. ..... day of. .... A. D. 1895, these defendants being advised and believing that the lands within the meander lines of what is known as Owl Lake, situated in township 92, north of range 27, Humboldt county, Iowa, were unsurveyed lands of the United States and subject to entry by settlers, did for the purpose of securing for themselves homes and improving and living upon same, enter and settle upon certain lands within the limits of the meander lines of said Owl Lake, built thereon houses and occupied the same as homes. That these defendants have since entering upon said lands, held the same as homes and held themselves out to the public as occupying claimants of public lands of the United States.

Par. 2. That the defendants herein settled upon and claimed for a home under the laws of the United States the following described premises, to-wit: SE¼ nw¼ and ne¼ sw¼ and sw¼ ne¼ and nw¼ se¼ section 27, township 92, range 27, Humboldt county, Iowa, and George S. Wallace sw¼ section 22, township 92, range 27, and that they claim the same under and by virtue of the preemption and homestead laws of the United States. That the lands upon which they settled were at that date unsurveyed lands of the United States.

Par. 3. Defendants further allege that on the 28th of

September, 1850, the date of the act of Congress granting to the State of Iowa and other states certain swamp and overflowed lands within their respective limits for the purpose stated in said act, the lands comprised within the limits of the meander lines of Owl Lake, located in township 92, range 27, Humboldt county, Iowa, were covered by a body of water from six to fifteen feet in depth. That said lake had well defined shores and high banks on the south and east sides thereof and that said lake was then and up to the time it was drained from six to fifteen feet in depth and navigable by ordinary steamboats. That the same was not at the date of said grant of swamp lands and was not at any time thereafter swampy and that said lands comprised within the limits of the meander lines of said Owl Lake did not come within the meaning of said grant as "swamp and overflowed" lands.

Par. 4. These defendants further aver that whatever rights plaintiffs may have in the land above described, they are junior and inferior to those of these defendants.

Wherefore, defendants ask that plaintiffs' petition be dismissed with costs of suit; that defendants be decreed to be rightfully in possession of said premises as settlers upon unsurveyed lands of the United States in good faith, and entitled to all the rights accruing to them as such settlers, and have such other and further relief as they may in equity be entitled.

Duly verified.

And on July 23, 1896, plaintiffs filed the following

AMENDMENT TO PETITION..

Come now the plaintiffs and amend their petition in the above and foregoing cause of action, by stating that since the commencement of the above entitled suit the lands described in the petition have been patented by the United States to the State of Iowa, as inuring to the State of Iowa, under the swamp land act of the year 1850; that said patent has been duly filed for record in the office of the recorder of deeds of Humboldt county, Iowa, and recorded in deed book ....., on page ....., on the .....day of.... ...., A. D. 189...; that thereafter and on the.....day of..... ....., A. D. 189..., the State of Iowa duly patented said lands to Humboldt county, Iowa, which said

patent was duly filed for record in the office of the recorder of deeds of said county, on the.....day of....., A. D. 189..., and duly recorded in book .....of deeds, and page..... thereof; and that by reason of the premises alleged in said petition and this amendment thereto, the ownership of said real estate is now vested in these plaintiffs.

Wherefore the plaintiffs renew the prayer of their petition.

Duly verified.

And on the 25th day of July, 1896, plaintiffs filed the following:

ANSWER TO PETITION OF INTERVENOR.

Come now the plaintiffs and answer the petition of intervention as follows:

I. DEFENSE.

They deny each and every allegation in said petition of intervention contained, except as the same are hereinaf er admitted.

1. They admit that the land described in plaintiffs' petition was formerly a part of what was called the bed of Owl Lake, lying wholly within the State of Iowa.

2. They admit that the State of Iowa was admitted into the Union, as a State, in the year 1846.

3. They admit, that in surveying a portion of the lands adjoining the so-called lake, the same was meandered, and said land adjoining said lake up to the said meander lines, was sold by the government of the United States to divers persons.

4. They admit that said so-called lake has been drained and the water drawn therefrom.

II. DEFENSE.

For other and still further defense to said petition of intervention, the plaintiffs state:

That the lands in controversy formerly formed a part of the swamp and overflowed land located in said Humboldt county, and as such the title to the same was in the United States.

That by the proper officer of the government, and by the tribunal provided by law, and on evidence properly before it, the

character, quality and condition of said lands were duly adjudicated in the manner provided by law, and the title formerly held by the United States passed to Humboldt county through the patents mentioned in the amendment to plaintiffs' petition, and by and through the contracts made by Humboldt county to the grantors of the plaintiffs, the same has inured to the benefit of these plaintiffs, and said patents have never been set aside, nor cancelled, nor has any proceeding ever been commenced, to which the United States was or is a party, looking to such setting aside or cancellation.

III. DEFENSE.

For other and still further defense to said petition of intervention the plaintiffs state:

That on the.....day of....., A. D. 1895, the said intervenor duly patented the said lands to Humboldt county, Iowa, as swamp land, and the said patent at once inured to the benefit of said plaintiffs, under the contracts and deeds made by the said county to their grantors, and which are set out in plaintiffs' petition.

That said patent conveyed whatever title the State had to said land at the time of the execution of the same, and said patent has never been set aside nor cancelled.

IV. DEFENSE.

For other and still further defense to the petition of intervenor the plaintiffs state:

That since this action was commenced, and in the spring of 1895, with the knowledge, acquiescence, and the encouragement of said intervenor, these plaintiffs, in order to prove the character of said land as being swampy or otherwise, at great cost and expense, procured affidavits of many residents of Humboldt county, who had known the said lands for many years, as to its swampy character.

That said affidavits were submitted to the governor of the state of Iowa, who, under the provisions of chapter 138 of laws of the 5th general assembly of Iowa, is authorized to adopt such means as to him may seem expedient to provide for the selection of the swamp lands of the state, and to secure to the state the title to the same.

That said intervenor, by its governor, who deemed the showing made by said affidavits to be sufficient to show that said lands were of a swampy character, and inured to the State of Iowa, under the swamp land act of the year 1850, did, agreeably to the provisions of chapter 84 of volume 9, United States Statutes at Large, request the Secretary of the Interior to patent the said lands to the State of Iowa.

That relying upon the good faith of the state in asking the United States government to patent said lands to it as swamp lands, and believing that the State of Iowa would, after the said lands were patented to it as swamp lands, patent the same, as swamp lands, to the county of Humboldt; and that it would not, after asking the United States government to patent the lands as swamp lands to itself, and after it had patented the same as swamp lands to Humboldt county, ever claim that the lands thus patented were not swampy, they submitted to the Commissioner of the Land Office of the United States, affidavits, and made their showing before said commissioner as to the swampy character of said lands; that this was done by them at great cost and expense, and the showing thereby made by them was, by the land department of the United States, deemed sufficient to prove that the said lands were swampy, and passed to the State of Iowa, under the swamp land act of the year 1850; and accordingly, the said land was on the.....day of....., 1895, patented by the United States to the State of Iowa, as swamp land; that on the.....day of..... ...., 1895, the said land was by the State of Iowa patented as swamp land to Humboldt county; and plaintiffs aver that the State of Iowa is now estopped to claim that title to the said lands was not in the United States in the year 1850, or to claim that said lands were not of a swampy character, or to claim that the same did not pass under the said patent, made by the United States to the State of Iowa, or to claim that intervenor, after making its own patent to Humboldt county, purporting to convey the said lands as swamp lands, is now the owner of said lands, or has any right, title, interest claim or demand in or to the same.

And on November 28, 1896, the following stipulation, signed by all parties to this action, was filed:

STIPULATION.

It is hereby stipulated that the following facts are admitted and that this stipulation may be introduced on the trial to prove the same, to-wit:

That the defendants settled or squatted on the land—each upon the land described in his own answer and the amendment thereto—with the intention to acquire ownership thereof under the homestead or pre-emption laws of the United States in case the ownership could be thus acquired, the defendants treating the land as the unsurveyed lands of the United States.

And on the 2d day of December, 1896, the intervenor filed the following

REPLY OF INTERVENOR.

Comes now said intervenor and denies each and every allegation of the plaintiffs' answer which is inconsistent with the said intervenor's petition. The said intervenor, for further reply, avers that any and all patents issued by the land commissioner or others in the name of the United States to the State of Iowa, and any and all acts of the Governor of Iowa in requesting the said alleged patents to be issued to the state, and in issuing a patent to Humboldt county, if any was issued, were without authority of law and all such acts were done at the instance and by the procurement of the said plaintiffs and upon the *ex parte* affidavits procured and prepared by said plaintiffs for the purpose of inducing the said governor to take the action requested by said plaintiffs as aforesaid.

Wherefore said intervenor says it is neither bound nor estopped by the acts of said governor.

PARAGRAPH 7.

Paragraph 7, in the case of George R. Pearsons vs. A. F. Johnson et. al., is as follows: That said land consisted of the following described lands, viz: Those unsurveyed portions of section 27, which if surveyed, would constitute the n½ of the sw¼ and the s½ of the nw¼ of section 27, township 92 north, of range 27 west, of the 5th P. M., Iowa, being a part of the lands conveyed as aforesaid by Humboldt county to the Fort Dodge & Fort Ridgely Railroad Company, as shown by paragraph 4 hereof.

Paragraph 7 in the case of Pearsons vs. Wallace et. al., is as follows: That said land consists of the following described lands, to-wit: The unsurveyed portions of sections 27 and 28, in township 92 north, of range 27 west, of the 5th P. M.

Paragraph 7 in the case of Rood et. al. vs. Barrett et. al., is as follows:

Par. 7. That thereafter and on the.....day of..... 1892, the said George R. Pearsons, by deed in writing conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners thereof, and which said land is described as follows:

The unsurveyed portions of sections 21 and 22, in township 92 north of range 27 west of the 5th P. M., Iowa, the same being the north part of Owl Lake, so-called, lying within the bounds of the sections named above, and enclosed by wire fence, except on the south side.

Also a portion of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21 in township 92 north of range 27 west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarter degrees west, variation 9½ degrees, 254 rods to the main ditch now built in the so-called Owl Lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28, in said township and range; thence north 30 chains and 80 links to the place of beginning. The same being part of the lands conveyed by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

Paragraph 7 in the case of Rood et, al. vs. O'Connell et. al. is as follows:

Par. 7. That thereafter and on the.. .....day of..... 1898, the said George R. Pearsons, by deed in writing, conveyed the said land to the plaintiffs in this suit, and which said land these plaintiffs are now owners theroof, and which said land is described as follows:

The unsurveyed portions of sections 21 and 22 in township 92 north of range 27 west of the 5th P. M., Iowa, the same be-

ing the north part of Owl Lake, so-called, lying within the bounds of the sections named above and enclosed by wire fence except on the south side.

Also a portion of Owl Lake, so-called, bounded as follows, to-wit:

Commencing on the southeast corner of section 21 in township 92 north of range 27, west of the 5th P. M., Iowa, thence east 186 rods; then south five and three-quarters degrees west, variation 9½ degrees, 254 rods to the main ditch now built in the so-called Owl Lake; then following the main ditch in a northwesterly direction to the section line between sections 27 and 28, in said township and range; thence north 30 chains and 80 links to the place of beginning, the same being part of the lands conveyed by Humboldt county to the Fort Dodge and Fort Ridgely Railroad Company as shown by paragraph 3 hereof.

JUDGMENT.

And after listening to the evidence and the argument of the counsel, and on the 11th day of February, A. D, 1897, the District Court of Humboldt county, Iowa, filed a decree and judgment dismissing intervenor's petition, and at intervenor's cost, and quieting the title in each case in the plaintiffs respectively, to which judgment and decree defendants and intervenor excepted at the time.

And thereafter said case was appealed to the Supreme Court of the State of Iowa, and at the January term, A. D. 1899, said cause was duly submitted to the Supreme Court of Iowa, and the case having been fully considered, said court did, on the 26th day of May, 1899, file its written decision, the same being in words and figures following, to-wit:

DEEMER, J.

The township in which the land in controversy is situated, was surveyed and platted by the General Government in the fall of the year 1851. What was denominated upon the plats as "Owl Lake," was meandered, and the land adjacent thereto was sub divided into regular and irregular tracts. Some of the lots were designated as "swamp lands," and all of the tracts surveyed were sold

to various parties many years before this litigation began. At some places this lake had well-defined banks and shore lines, and at other places it had no banks, but diverging into a slough or low wet lands. It had some clear water, but, as a general rule, was filled with rank weeds, water lillies and rushes. In the year 1884, plaintiffs dug a ditch which drained off much of the water, and in 1894 this ditch was deepened and widened, with the result that the land is now almost wholly fit for cultivation. In January of the year 1879, the county conveyed all of its remaining swamp lands to the Fort Dodge and Fort Ridgely Railroad Company. In 1895, plaintiffs, having previously obtained a title or claim of title to the land through certain mesne conveyances from Humboldt county and having drained the same, applied to the then governor to request the Land Commissioner of the United States land office to issue a patent for the land in controversy to the State under the act of Congress hitherto mentioned. The request was made and granted, and a patent was issued to the State. The governor thereupon issued a patent to the county under date of April 30, 1895. Humboldt county was not organized until January 15, 1857. The character of the so-called "lake" is a matter of much dispute. Some of the witnesses describe it as a shallow lake, while others say that it was marsh or swamp land. The State makes the following contentions regarding the ownership of the land: (1) That the lake beds of all meandered lakes and streams in the State belong to the State of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend upon any act of Congress or grant from the United States. (2) That the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey fixes the status of the meandered lake and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department. (3) That the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State. (4) That the Governor of the State of Iowa was unauthorized by any laws to request the Land Commissioner of the United States to issue a patent for the land in

controversy, and hence the two patents, first from the United States to the State of Iowa, and from the State of Iowa to Humboldt County, were wholly void.

We are quite ready to assume, as a general proposition, that the title to all the lake beds in the state, especially those of navigable lakes, is in the state, and that the General Government never had any control or ownership thereof. Indeed, this seems to be the almost unbroken voice of authority. Pollard's Lessee vs. Hagan, 3 How., 212; Withers vs. Buckley, 20 How., 92; Shively vs. Bowlby, 152 U. S., 1; 14 Sup. Ct., 548; Mann vs. Land Co., 153 U. S., 273; 14 Sup. Ct., 820; Knight vs. Association, 142 U. S., 161; 12 Sup. Ct., 258; Illinois Cent. R. Co. vs. Illinois, 146 U. S., 387; 13 Sup. Ct., 110; Gunter vs. Geary, 1 Cal., 463; Hinman vs. Warren, 6 Or., 408; Haight vs. City of Keokuk, 4 Iowa, 199; Hardin vs. Jordan, 140 U. S., 371; 11 Sup. Ct., 808, 838; Veazie vs. Moor, 14 How., 568; Noyes vs. Collins, 92 Iowa, 566; 61 N. W., 250; Lamprey vs. Metcalf, (Minn.), 53 N. W., 1139. But when, how, and by whom is the question of whether the land is a lake bed to be determined? The attorney-general contends that this is done at the time the original survey is made, by the approval of the survey, and the sale of the lands with reference thereto. At the time the original survey was made the following was one of the rules promulgated for instruction of surveyors: "You are also to meander, in manner aforesaid, all lakes and deep ponds of the area of 25 acres and upwards, also all navigable bayous; shallow ponds, readily drained or likely to dry up, are not to be meandered." Lester, Land Laws (ed. 1860), p. 714. And while the instructions require a plat of the township to be made designating swamp lands, streams, etc., and that the plats for the township be approved by the Surveyor General, the Commissioner of the Land Office, and, in case of controversy, by the Secretary of the Interior, yet prior to April 17, 1879, it was not the practice of the Land Department to acquire any specific approval by the Commissioner of either the surveys or the plats. Tubbs vs. Wilhoit, 138 U. S., 142; 11 Sup. Ct., 279. Moreover, the requirement as to the approval was simply a rule of the department, which might be waived. It did not have a statutory sanction. But suppose that the Surveyor General and the Land Commissioner did approve the plat of the original survey, is this conclusive upon the par-

ties? That question seems to be answered by our own cases. See Grant vs. Hemphill, 92 Iowa, 218; 59 N. W., 263; and 60 N. W., 618; Bigelow vs. Hoover, 85 Iowa, 161; 52 N. W., 124; Glenn vs. Jeffrey, 75 Iowa, 20; 39 N. W. 160. In these cases the original survey was not given the force of an adjudication, but the fact as to the character of the land was determined by evidence alike. The Attorney General frankly concedes that the General Government may have a resurvey in case of fraud, palpable mistake, or for some other causes, but he contends no such resurvey can be made after the first survey has been approved and lots sold with reference thereto. No doubt this is a general rule, but who may complain of this resurvey? Surely not the State; or if the General Government has power to order a resurvey because of a mistake, it also has power to determine whether there has been a mistake. Purchasers of lots abutting on the meandered line or otherwise directly interested are, it seems to us, the only persons who may object to the resurvey, and no resurvey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit and are making no objection to plaintiffs' title. The case of Moore vs. Bobbins, 96 U. S., 530, and other like cases, relied on by appellant, relate to the power of the General Government over lands to which it has issued a patent, and it is there held that the functions of the executive department cease when the title has passed from the General Government. As to the power and right of the Secretary of the Interior to set aside a survey or to order unsurveyed lands surveyed, see Knight vs. Association, 142 U. S., 161; 12 Sup. Ct., 258; Cragin vs. Powell, 128 U. S., 691; 9 Sup. Ct., 203; Railroad Co. vs. Butler, 159 U. S., 87; 15 Sup. Ct., 991.

In the first case it is said: "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department within the scope of its authority is unassailable in the courts except by a direct proceeding." Cragin vs. Powell, 128 U. S., 691, 699; 9 Sup. Ct., 203, and cases cited. Under this rule it must be held that the action of the land department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant as es-

tablished by the confirmation decree, is binding in this court, if the department had jurisdiction and power to order that survey. It is claimed, however, and the referee so determined, that no such power or authority existed in the department, because it had been exhausted by the action of the commissioner of the general land office in approving and confirming the Stratton survey in 1878. This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appeal was taken from such order and the authorities of the city acquiesced in that survey. This proposition is unsound. We conclude on this branch of the case, that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht, and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leicht survey, therefore, must be held as a correct survey of the pueblo claim as confirmed by the circuit court. Moreover, the method of running the shore line of the bay of San Francisco, adopted by the Von Leicht survey, was approved by the circuit court itself in Tripp vs. Spring, 5 Sawy, 209, Fed Case No. 14180, and on this point we entertain no doubt. There seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to redetermine the question as to whether or not the land in question was a part of the lake bed or was covered by the so-called "Swamp Land Act." And this brings us to the next question, What force is to be given the determination of the land commissioner that the land was in fact swamp land, and what effect is to be given the patent issued to the State? That question seems to be answered by Rogers Locomotive Mach. Works vs. American Immigrant Co., 164 U. S., 559; 17 Sup. Ct., 188. In that case it is held that a decision of the Secretary of the Interior, to the effect that certain lands did not pass as swamps under the act of 1850, and the acceptance and transfer of them by the State was conclusive upon one who claimed title under the swamp land act. Again, in French vs. Fryan, 93 U. S., 169, that court said that "by the second section of the swamp land act the power and duty devolved upon the Secretary of the Interior, as the head of the department which administered the

affairs of public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling." See, also, as sustaining the same conclusion, Chandler vs. Mining Co., 13 Sup. Ct., 798; McCormick vs. Hayes, 159 U. S., 332; 16 Sup. Ct., 37. In Steel vs. Refining Co., 106 U. S., 447; 1 Sup. Ct., 389, we find this language: "That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of the different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant and the acts he is to perform to secure title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation." As the Land Department determined the lands in controversy to be swamp and issued its patent to the State accordingly, that determination is conclusive and the patent cannot be collaterally attacked. Steel vs. Refining Co., *supra;* Wright vs. Roseberry, 121 U. S., 488; 7 Sup. Ct., 985; Minter vs. Crommelin, 18 How., 87.

The State further claims that plaintiffs have not made out their chain of title, in this: that they have not shown that the conveyance from the county to the Fort Dodge Railroad Company was ratified by the vote of the people. It may be that the evidence on this point is insufficient, but the record does show that plaintiffs are in possession of the land under claim of title. The State intervened and asked relief against them. As they are in possession, and were at the time this suit was commenced, the intervenor must recover on the strength of its own title and not on the weakness of its adversaries'. If the State has no title, its petition of intervention should be dismissed without regard to the title under which the plaintiffs claim. Their possession is a sufficient defense to the petition of intervention, for the State cannot rely upon title in a third person to defeat plaintiffs' recovery.

Lastly, it is said that the Governor of the State has no authority to request the Land Commissioner to issue a patent for

the land in controversy, and that the patent to the State and from the State to the county are void. His authority in the premises is conferred by the act of the general assembly, passed January 25, 1855, which reads as follows: "The Governor is "hereby authorized to adopt such measures as to him may seem "expedient to provide for the selection of the swamp lands of this "state, and to secure to the state the title to the same, and also for "the selection in the name of the state of other lands in lieu of "such swamp lands as may have been or may hereafter be entered "with warrants." See Acts 5th Gen. Assem., c. 138, sec. 3. Whenever question arose as to the character of land such as that in dispute, it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter, and, having so submitted it, that decision is final. If there was no real dispute as to the character of the land—if, for instance, the property was a part of the bed of any of the navigable rivers of this state, or if it was property that was clearly lake bottom—it may be that the governor would not be justified in submitting the matter as to its character to the land department, and if he did so, and the land department found that the land was swamp when surveyed, such conclusions would be null and of no effect; but when there is a fair dispute as to the character of the land when originally surveyed, surely, the land department has the right to determine the dispute, and, as a general rule, its decision is binding until set aside by direct attack. The whole case, in our judgment, turns upon the effect to be given the original survey. If that is conclusive, it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms the title thereto in the state. If the survey is not conclusive, but is simply administrative or advisory, then the Land Department has the right, at some future day, to determine its character and cause a patent to issue accordingly; and when this is done the finding is not subject to collateral attack. As has been said, we do not regard the original survey conclusive. There may be a re-survey, or an independent investigation as to the character of the land, and as a special tribunal is provided for that investigation, its determination is ordinarily conclusive. It follows from what has been said that the decree of the District Court is correct, and it is affirmed.

ASSIGNMENTS OF ERROR.

Now comes the State of Iowa, intervenor in the suit referred to in the attached petition for writ of error, by its authority, Milton Remley, and says that in the record and proceedings had in the Supreme Court of the State of Iowa in said suit, in which it is appellant and Rood et. al. are appellees, there is manifest error in this, to-wit:

1.

The court erred in not holding that the lake beds of all meandered lakes and streams in the State of Iowa belong to said State in trust for the public by virtue of its sovereignty, and that this right does not depend upon any act of Congress or grant from the United States.

2.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and a sale of the lands under such survey did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department.

3.

The court erred in not holding that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State.

4.

The court erred in holding that the Land Commissioner of the United States had authority to take jurisdiction of the lake beds and to reinvestigate the question after the lapse of forty-four years, and to issue a patent therefor, notwithstanding the alleged request of the Governor so to do.

5.

The court erred in holding that the patent issued for unsurveyed lake beds in the State of Iowa could not be attacked or investigated by the courts; that the issuance of said patent was a finality, binding and conclusive upon the parties, especially the State of Iowa.

6.

The court erred in holding that the Constitution of the United States and the acts of Congress prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, and issuing a patent therefor under the swamp land act, and that the state was bound by the acts of the Land Commissioner in executing such patent.

7

The court erred in holding that the patent to the lake bed in question could not be attacked by the courts of the State, and that the same was final and conclusive as against the State.

Wherefore the State of Iowa prays that the judgment of the Supreme Court of the State of Iowa be reversed.

The above and foregoing, we think, sufficiently states the case for the purposes of said motion.

R. M. WRIGHT,
Counsel for the Defendants in Error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

The points relied upon by the plaintiff in error for a reversal of this case in the Supreme Court of Iowa, were four in number, and were substantially as follows:

1. That the Governor of the State of Iowa had no authority to request the Interior Department of the United States to issue a patent to the State, and, therefore, the State had no power or authority to issue a patent to Humboldt county.

2. That the lake beds of all meandered lakes and streams of the State of Iowa belong to the State of Iowa, in trust for the public, by virtue of its sovereignty, and this right does not depend upon any act of Congress or grant from the United States.

3. That the Secretary of the Interior had no authority, by act of Congress or under the Constitution, to patent the land to the State of Iowa.

4. That the survey of the public lands of the United

States, and the approval of such survey by the Land Commissioner and the Secretary of the Interior of the United States, and the sale of lands under such survey, fix the *status* of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the Land Department.

The above named points will in this argument be noticed in connection with the assignments of error.

I.

FIRST ASSIGNMENT OF ERROR.

The Court erred in not holding that the lake beds of all meandered lakes and streams in the State of Iowa belong to said State, in trust for the public, by virtue of its sovereignty, and that this right does not depend upon any act of Congress or grant from the United States.

The Supreme Court did not hold the above question adversely to the plaintiff in error, on the contrary (*supra* page 26), it says: "We are quite ready to assume as a general proposition "that the title to all the lake beds in the state, especially those "of navigable lakes, is in the state, and that the general govern-"ment never had any control or ownership thereof. Indeed, this "seems to be the almost unbroken voice of authority." The thought of the Supreme Court of Iowa was this: It recognized that originally the dry lands, the swamp lands, the navigable lakes and the non-navigable lakes were all within the territory of the United States undelimited one from the other. It recognized that the power to make delimitation, i. e, to separate the public domain from the navigable waters and lake beds was in the United States, and that by and under the laws of the United States one of the functions of the Land Commissioner and Secretary of the Interior of the United States was, by appropriate government surveys, to do this very thing, i. e., to separate the public lands, that is, the lands that might be disposed of by the United States, from the lake beds and navigable waters which might not be so disposed of. Recognizing these facts, the Supreme Court of Iowa then determined and held that as between the State and the Land Department of the United States (in the absence of the intervening rights of innocent third parties owning

lands abutting upon or adjacent to the so called lakes) said Land Department had the right and authority to re-examine and re-investigate the question as to the State's right to such lake beds and to determine the question against the so-called right of the State to said lake beds.

What the powers of the Governor of the State of Iowa are in matters which concern the State of Iowa, is a question solely within the cognizance of the Constitution and laws of the State of Iowa as construed by the Supreme Court of Iowa. The act of the General Assembly of Iowa, passed January 25, 1855, reads as follows:

"The Governor is hereby authorized to adopt such measures "as to him may seem expedient to provide for the selection of the "swamp lands of this State, to secure to the state the title to the "same; also for the selection, in the name of the State, of other "lands in lieu of such swamp lands as may have been or may "hereafter be entered with warrants." In the case at bar the Supreme Court of Iowa says, "It was certainly competent for the "Governor to submit the matter to the one authority that had "original jurisdiction in the matter."

The Land Department of the United States, under the laws of the United States, is the authority to whom proof of the swampy or non-swampy character of lands is to be submitted. It is that department, which, under the law, passes upon the proof so submitted and which issues the patent.

If the decision of the Land Department in the case at bar was erroneous, said department simply exceeded its power, and such error cannot be corrected in this collateral proceeding. The decision of the Supreme Court of Iowa did not draw in question the validity of a treaty or statute of, or an authority exercised under, the United States, nor did it thereupon decide against the validity of such treaty, statute or authority so exercised. It decided, if it decided anything, in favor thereof.

The Supreme Court of Iowa did not draw in question the validity of the statutes or authority exercised under any state on the ground of their being repugnant to the Constitution or laws of the United States. Whatever was decided was in favor of the laws of the United States.

Again, the said Supreme Court was not bound to hold that the beds of the non-navigable, meandered lakes belong to the State of Iowa, in trust for the public, by virtue of its sovereignty; it might have held, as courts in many of the states have held, that the beds of such lakes belong to the riparian owners and not to the state.

This court has decided that the question of ownership of the beds of non-navigable, meandered lakes is a question for the determination of the states wherein the said lakes are situated. It is a question of state law. and is to be determined solely by such law.

Eldridge vs. Trezovant, 160 U. S., 452
St. Anthony Falls Water Power Company vs. St. Paul Water Commission, 168 U. S, 349.
Jersey City, etc, Railroad Company vs. Morgan, 160 U. S., 288.
Bartlett vs. Lockwood, 160 U. S., 357.
Hardin vs. Jordan, 140 U. S., 371.
Kaukauna Water Power Co., vs. Green Bay and Mississippi Canal Co., 142 U. S., 254.
Shively vs. Bowlby, 152 U. S., 1.
Lowndes vs. Huntington, 153 U. S, 1.

Under the theory of the plaintiff, the right of the State of Iowa to these lake beds is not claimed under the Constitution of the United States, nor under any treaty or statute of, or commission held, or authority exercised, under the United States, but its right is claimed to be a part and parcel of the State's inherent sovereignty, and as such, is an independent right. "When the "Revolution took place the people of each state became themselves sovereign: and in that character held the absolute right "to all their navigable waters and the soils under them for their "own common use, subject only to the rights since surrendered "by the Constitution to the General Government."

Shively vs. Bowlby, 152 U. S., 16.

The new states since admitted into the Union have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders.

Shively vs Bowlby, 152 U. S, 30.

Now the record in this case shows that the so-called Owl Lake was a non-navigable lake.

Plaintiff in error claims that the title to the beds of meandered, non-navigable lakes is in the State exactly the same as is the title to the beds of its navigable waters. If this be so, it must certainly be true that the right to such lake beds was never surrendered by the Constitution to the General Government, because with the beds of non-navigable lakes the Constitution can have no concern; the United States can have no possible interest in them. This being so, there can be no federal question in this case; it cannot be said that the Supreme Court of Iowa has decided in this case adversely to any right, title, privilege, or immunity claimed under the Constitution of the United States, nor under any treaty or statute of, or commission, or authority exercised, under the United States. In other words, the plaintiff in error cannot say, in the same breath, that there is and there is not a federal question involved. In this view of the case, all that the Supreme Court of Iowa did, was to render a decision against the alleged right of the State in a matter entirely independent of any and all federal questions. The case at bar, under this assignment of error, in so far as the constitution, laws, rules, regulations, or authority of the United States are concerned, is exactly the same as it would be, were Iowa an independent nation.

The right of the state, in such case, is just as unrelated to any federal question as is its right to punish with respect to an assault and battery committed by one of its citizens, within its own borders, upon another of its citizens. It is a right that has never been delegated or surrendered to the Federal Government. If, therefore, the decision of the State Court is based upon an assumption that the Interior Department had a power which, in fact, it did not possess, such decision may be erroneous, but it does not come within the purview of Section 2 of the Judiciary Act of 1867.

II.

SECOND ASSIGNMENT OF ERROR.

The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land

Commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey, did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud beyond recall by any subsequent act of the Land Department.

In passing upon this Assignment of Error there are two things which are important to be considered:

First. What was decided by the Supreme Court of Iowa?

Second. Just what is the federal question involved?

The Supreme Court of Iowa decided that where lands at one time belonged to the State of Iowa, either because they inured to it under the Swamp Land Act of 1850, or because they inured to it by virtue of its sovereignty, and where the Governor of the State had requested the Secretary of the Interior to patent such lands to the State as swamp lands, and the Secretary had patented the lands as such, and the State had in turn patented them to a third party, then, in such case, the last patentee is and should be deemed to be the owner of the lands so patented.

Now what is the federal question involved? The Governor of Iowa, as we have seen, had the right and authority and it was his duty, under the act of the Legislature of the State of Iowa, to ask the Secretary of the Interior to patent to the State of Iowa all lands which he deemed to be swamp and overflowed lands inuring to the State of Iowa under the act of 1850, and the Supreme Court of that State has, in the case at bar, decided that he had such right and power, and to reach such decision said Court did not pass upon any federal question.

The Governor of the State of Iowa, in asking the Secretary of the Interior to patent the land to the State, as truly and legitimately represented the State in so doing, as does the Attorney-General of the State in this proceeding. The Land Commissioner of the United States and the Secretary of the Interior are the officers, who, under the laws of the United States, are charged with the management of the public lands of the United States. It is they who pass upon the evidence presented as to the character of the lands; it is they who determine when patents shall issue; it is they who have control of the original government surveys of the public lands and who approve of such surveys; it is

they who by such surveys delimit the public domain, i. e., the lands of which the United States may dispose, and the lake beds and navigable streams of which the United States may not dispose. The power of the Secretary of the Interior under the law goes even further than above indicated. In the case of *Knight vs. The United States Land Association, 142 United States, 161*, it is laid down that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department is unassailable in the courts, except by a direct proceeding. In said case it is also held that in matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving on the government, by reason of the laws of Congress, or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government, to do justice to all claimants and to preserve the rights of the people of the United States. In said case it likewise held that the Secretary of the Interior has ample power to set aside one public survey, although the same may have been approved by the surveyor-general of the state and confirmed by the Commissioner of the General Land Office, with no appeal taken, and to order a new survey; and that his action in that respect is unassailable in a collateral proceeding.

In the case of *Brown vs. Hitchcock, Secretary of the Interior, 173 U. S., 473*, it is stated that certain lands (List No. 5) were selected by the State of Oregon as swamp land. On September 16, 1882, the selection was approved by the Secretary of the Interior, Henry M. Teller. Years afterwards, and on the 27th day of December, 1888, the then Secretary of the Interior, William F. Vilas, made and entered an order annulling, canceling and revoking the said list and the determination made by his predecessor in office, the said Henry M. Teller, and he, the said Vilas, determined that the said lands belonged to the public domain of the United States, and this court sustained the action of Secretary Vilas in setting aside the finding of his predecessor and the selection and approval of such predecessor.

I do not deny but that, as a general proposition, surveys that have been made under the supervision of the Land Commissioner

of the United States and that have been approved by the Secretary of the Interior, fix the *status* of the land surveyed. But this is not the question in this case. The question to be considered here is this: Does the mere act of having once approved a survey always and forever end the jurisdiction of the Secretary of the Interior in the premises, or has he the power when the rights of third parties do not intervene, and when he is called upon to act by the only party to be affected—has he the power or authority under the laws of the United States to re-investigate the character of land once surveyed?

In patenting the said lands to the State of Iowa, the Secretary of the Interior purported to be acting under the laws and authority of the United States; he purported to be exercising the power and authority of the Secretary of the Interior as given to him by the laws of the United States. Had he such power and authority? I care not whether he exercised it rightly or wrongly, had he such power?

The plaintiff in error says that in such case he had no such power; the Supreme Court of Iowa says that in such case he had such power. Under this assignment of error, therefore, this is the sole question for determination. The decision of the Supreme Court of Iowa was not against, but in favor of, the authority exercised under the United States. This being so, this court has no jurisdiction to review it. In order to warrant a review, the decision of the court below must have been against the claim, power or authority exercised and not in its favor. On this point the authorities are uniform.

Jersey City, etc, Railroad Company vs. Morgan, 160 U. S., 288, 293.
Bartlett vs. Lockwood, 160 U. S., 357, 358.
Whitten vs. Tomlinson, 160 U. S., 231, 238.
Missouri vs. Audriano, 138 U. S., 496.
The Commonwealth Bank vs. Griffith, 14 Pet., 56, 58.
Fulton vs. McAffee, 16 Pet., 149.
Linton vs. Stanton, 12 How., 423.
Reddall vs. Bryan, 24 How., 420.
Ryan vs. Thomas, 4 Wallace, 603.

The federal question must have been decided in a certain way, that is against the authority exercised under the United

States. The question may have been erroneously decided; it may be quite apparent that a wrong decision has been rendered, but unless the decision is against the authority exercised, the court cannot entertain jurisdiction.

Murdock vs. Mayor, etc., of Memphis, 20 Wallace, 590.

Again, the federal question, if there is one in this case, was not necessary to a decision of the case by the Supreme Court of Iowa. In its opinion said court says: "The Attorney General "frankly concedes that the general government may have a re-"survey in case of fraud, palpable mistake, or for some other "causes, but he contends no such re-survey can be made after "the first survey has been approved and lots sold with reference "thereto. No doubt this is a general rule, *but who may complain "of the re-survey?* Surely not the State; or if the General Gov-"ment has power to order a re-survey because of a mistake, it "also has power to determine whether there has been a mistake. "Purchasers of lots abutting on the meandered line or otherwise "directly interested are, it seems to us, the only persons who "may object to the re-survey, and no re-survey will be permitted "which will in any manner prejudice their interests. They, as "we have seen, are not made parties to this suit and are making "no objection to plaintiff's title." Here we have an adjudication that the state cannot complain of a re-survey; that only the abutting property owners can do that, and they are not in court. If the State may not complain, it is by that fact alone out of court; that fact alone decides the case. What difference does it make whether the Secretary of the Interior exceeded his jurisdiction in making a re-examination of the land? If as to his act, the state was not in a position to complain, that fact alone was sufficient for the disposition of the case regardless of any federal question. The federal question, therefore, became or was unnecessary to the decision of the case, and this Court, therefore, has no jurisdiction in the premises.

This Court is not required to re-examine the judgment of the State Court simply because a federal question may have been decided. To give this Court jurisdiction, it must appear that such a question was necessarily involved in the decision:

Henry Moore vs. State of Mississippi, 21 Wallace, 636.

It the record shows upon its face that a federal question was not necessarily involved, this court will not go outside of it, to the opinion of the court below, or elsewhere, to ascertain whether one was in fact decided.

Henry Moore vs. State of Mississippi, 21 Wallace, 636.

In order to give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that the decision of the federal question was necessary to the determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it.

DeSassure vs. Gallard, 127 United States, 216.
Johnson vs. Risk, 107 United States, 300.
New Orleans vs. New Orleans Water Works Company, 142 U. S., 79.

In the case of Murdock vs. Mayor, etc., of Memphis, 20 Wallace, 590, the court uses this language: "But in the other "cases supposed, why should a judgment be reversed for an error "in deciding a federal question, if the same judgment must be "rendered on the other points in the case? And why should "this court reverse a judgment which is right on the whole record "presented to us, or where the same judgment will be rendered "by the court below after they have corrected the error in the "federal question?"

"We have already laid down the rule that we are not auth- "orized to examine these other questions for the purpose of de- "ciding whether the state court ruled correctly on them or not. "We are of opinion that on these subjects not embraced in the "class of questions stated in the statute, we must receive the "decision of the State Courts as conclusive."

III.

THIRD ASSIGNMENT OF ERROR.

The court erred in not holding that the Land Commissioner of the United States Government had no authority by act of Congress or under the Constitution to patent to the State of Iowa any lake beds which had been meandered and were already the property of the State.

Had the Supreme Court of Iowa found against the defendants in error and held their patent void they might, in this court, contend that the court below erred in holding that the Land Commissioner of the United States had no authority to issue the patent; but it is a new doctrine that one may assign error based on a finding of the court below in favor of the authority alleged to have been exercised.

The supervising care of this court is not exercised for the purpose of restraining the State Court from holding in favor of the enlargement of powers claimed to be exercised under the United States. It is exercised for the purpose of preventing the State Court from crippling, hedging in and limiting the exercise of the power and authority of the United States.

When the decision of the State Court is in favor of the right, privilege, or authority claimed to have been exercised under the United States, this court has no jurisdiction to review it.

Jersey City Railroad Company vs. Morgan, 160 U. S., 288.

Bartlett vs. Lockwood, 160 U. S., 357.

IV.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the Land Commissioner of the United States had authority to take jurisdiction of the lake beds and to re-investigate the question after the lapse of forty-four years, and to issue a patent therefor, notwithstanding the alleged request of the Governor so to do.

What has been said under the second and third assignments of error will apply to this assignment and need not be repeated.

V.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the patent issued for unsurveyed lake beds in the State of Iowa could not be attacked or investigated by the courts; that the issuance of said patent was a finality, binding and conclusive upon the parties, especially the State of Iowa.

In this assignment of error there is the same vice as in the ones preceding. The Supreme Court of Iowa has not held what the said assignment of error would indicate that it has held, but for the sake of the argument, suppose that it has so held; thereby it has simply given greater force and efficacy to a patent issued by the United States than the plaintiff in error thinks should have been given to the patent; it has given greater force and efficacy, perhaps, than the federal courts would, themselves, give; but it has not found against the authority claimed to have been exercised under the United States; it has simply done the reverse.

The decision which the plaintiff in error claims the Supreme Court of Iowa has made, simply established for the State of Iowa a rule of property, which rule of property may be stated thus: Whenever a patent has been issued by the United States for unsurveyed lake beds situated in Iowa, that patent shall be the exclusive evidence of title to the property which it purports to convey. Such rule of property might not be the best rule that could be adopted; it might not in all cases be a just rule, but would that fact give this court jurisdiction to exercise a supervisory control over the Supreme Court of Iowa and dictate to it what the rules of property shall be in the State of Iowa?

In the case of *Lowndes vs. Huntington, 153 U. S., 19,* this court uses this language:

"With respect to the matter of title, there are involved not "mere y the construction of public grants and charters, but also "the extent and purposes to and for which the title and control of "submerged land may be passed away from the state to towns "and individuals. The question is of the rights attaching to cer- "tain lands within the territorial limits of the State, and whatever "becomes a settled rule of real property by the decision of its "courts is conclusive on this court. *Bondurant vs. Watson,* "*103 United States, 281, 289; Burgess vs. Seligman, 107 United* "*States, 20, 33; Gage vs. Pumpelly, 115 United States, 454;* "*Hardin vs. Jordan, 140 United States, 371, 382, 402; Shively* "*vs. Bowlby, 152 United States, 1.*"

In the case of *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Company, 142 United States, 271,* this

court uses the following language: "It is the settled law of "Wisconsin, announced in repeated decisions of its Supreme "Court: that the ownership of riparian proprietors extends to the "center of thread of the stream, subject, if such stream be navig- "able, to the right of the public to its use as a public highway for "the passage of vessels, * * * * * * With respect to "such rights we have held that the law of the state as declared "by its Supreme Court, is controlling as a rule of property." *"Barnes vs. Keokuk, 94 United States, 324; Packer vs. Burgess, 137 United States, 661; Hardin vs. Jordan, 140 United States, 371."*

"Where a course of decisions, whether founded upon statutes "or not, have become rules of property as laid down by the high- "est courts of the state, by which is meant the rules governing "the descent, transfer or sale of property and the rules which af- "fect the title and possession thereof, they are to be treated by the "Federal Courts as the laws of that state."

"Bucher vs. Cheshire R. R. Co. 125 U. S., 555."

"The courts of the United States will adopt and follow the "decisions of the highest court of the State, whether founded on "statutes or not, when the same have become rules of property "within the State. *Gormley vs. Clarke, 134 U. S., 348."*

VI.

SIXTH ASSIGNMENT OF ERROR.

The court erred in holding that the Constitution of the United States and the acts of Congress prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner in taking cognizance of the lake in question, which had been segregated as a lake from the public lands of the United States in 1851, and issuing a patent therefor under the swamp land act, and that the State was bound by the acts of the Land Commissioner in executing such patent.

The counsel for plaintiff in error seems by said assignment of error, to be under the impression that where the decision of the State Court is *in favor* of the validity of the authority exercised under the United States, it may be assailable in this court. The whole contention of the plaintiff in error is that the highest judicial tribunal of the State of Iowa had not sufficient regard

for the sovereignty of its own state, that it had not sufficient regard for the rights which properly belong to it, and that it gave to the Constitution of the United States and to the acts of Congress, and to the acts of the Land Commissioner of the United States and the Secretary of the Interior a latitude and potency which they do not possess. This court has been frequently called upon to set aside the decisions of the highest courts of the states, because they intrenched upon and limited the scope of the Constitution of the United States and the acts of Congress, or the powers exercised by the Land Commissioner of the General Land Office or those of other officers of the government, but it has, I think, rarely been called upon to set aside the decisions of the highest court of a state, because that court did not have a sufficiently exalted idea of the sovereignty of its own state, and had too exalted an idea of the powers of the Federal Government. This is not a case where the State of Iowa claims a right under a patent of the United States, which the Supreme Court of the State ignores; it is not even a case where the citizens of the State claim a right under the State, which the State court ignores; it is a case where the State says that its own Supreme Court will not clothe it with the title to land which it has, itself, conveyed away. Suppose this court should reverse the case and remand it, and that the Supreme Court of Iowa should say, "We care not whether the Secretary of the Interior had or had "not the power to issue a patent, we say, as we have already in "substance said before, the State of Iowa, under the circumstan-"ces of this case, is in no position to complain; only the abut-"ting property owners can do that." Would not the ultimate decision of the case stand just the same as if no writ of error had been taken to this court?

As the 7th assignment of error is practically the same as the 5th assignment, I shall not further notice it.

I respectfully ask this court to dismiss the case for the reasons above urged.

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